

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1930

No. 5322

943

ARON POLISZEK, ALIAS HARRY FISHBONE,
APPELLANT,

vs.

WILLIAM N. DOAK, SECRETARY OF THE DEPARTMENT OF LABOR OF THE UNITED STATES OF AMERICA, AND/OR ROBE CARL WHITE, ACTING SECRETARY OF THE DEPARTMENT OF LABOR OF THE UNITED STATES OF AMERICA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 18, 1930.

PRINTED FEBRUARY 20, 1931.

Court of Appeals of the District of Columbia

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JAMES J. DAVIS, SECRETARY OF THE DEPARTMENT OF LABOR OF THE UNITED STATES OF AMERICA, AND/OR ROBE CARL WHITE, ACTING SECRETARY OF THE DEPARTMENT OF LABOR OF THE UNITED STATES OF AMERICA, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5322.

ARON POLISZEK, alias HARRY FISHBONE, Appellant,
vs.

WILLIAM N. DOAK, Secretary of the Department of Labor
of the United States of America, et al.

a Supreme Court of the District of Columbia.

Law. No. 70591.

ARON POLISZEK, alias HARRY FISHBONE, Petitioner,
vs.

JAMES J. DAVIS, Secretary of the Department of Labor of
the United States of America, and/or Robe Carl White,
Acting Secretary of the Department of Labor of the
United States, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Writ of Prohibition.*

Filed September 12, 1925.

In the Supreme Court of the District of Columbia.

Law No. 70591.

ARON POLISZEK, Alias HARRY FISHBONE, Petitioner,
vs.

JAMES J. DAVIS, Secretary of the Department of Labor of
the United States of America, and/or Robe Carl White,
Acting Secretary of the Department of Labor of the
United States of America, Respondents.

1. This petitioner shows that he is twenty-six years of
age, a Jew, and he arrived in the United States of America,

via Poland, from Russia, of which latter country he is a native, on December 22, 1922, and on January 11, 1923, he was admitted under bond, a copy of which is filed herewith as Exhibit "A" to this petition and petitioner has duly made and filed all the reports required by same from time to time, and he brings this suit in his own right.

2. That James J. Davis is a citizen of the United States, residing in the District of Columbia, and is Secretary of the Department of Labor of the United States of America; that Robe Carl White is a citizen of the United States, residing in the District of Columbia, and is the First Assistant Secretary of Labor, and in the absence of respondent Davis, is the Acting Secretary of Labor, and as respondent Davis is now absent, the respondent White is acting as secretary and this suit is brought against the respondents as such.

3. That after petitioner sailed from Russia in 1922 and before he arrived, his father who was a resident of the State of Connecticut, having a business and owning real estate therein, died, and as all of petitioner's brothers and sisters were admitted to the United States and were living and in business in the United States, as well as all of his relatives, and his mother being dead, he had no relatives outside of the United States.

4. As petitioner was a deaf and dumb mute, physically unable to read and write, a blacksmith by trade, and had no relatives out of the United States and had a share in the real estate and other estate of his deceased father in Connecticut, he was because of the hardships of the case, admitted under bond, one reason among others, being given, was for the purpose of looking after his interest in his father's estate, which estate has not yet been divided or settled, and he was required to give bond to protect the United States and the several states from petitioner becoming a public charge and the bond was given, and regularly renewed, and petitioner was immediately placed in the Mystic Oral School for the Deaf, Walter J. Tucker, Superintendent, Mystic, Connecticut, being a state institution, where he is still such a student, and employed, as he has learned to read and write in both English and Hebrew, and has become a plumber and engineer and the institution gives him his board and lodging and a certain amount of additional schooling each day and further pays him a sum

of \$40.00 per month for his services; that the school has certified that he is a valuable man to the school, will not become a public charge, is able to earn his living anywhere and capable of saving his earnings, and that he is an exceptional young man of clean habits, honest and ambitious, and having made reasonable progress in his work, it would be a detriment for him to have to leave now, as he
3 being deaf and dumb, can get along with and understand and help the other students who are likewise deaf mutes better than can those who can hear and talk and do not understand the condition of mutes.

5. That on July 15, 1923, your petitioner's time was extended for one year for the purpose of further education on like bond being given, which was given and in June 1924 your petitioner's time was again extended for one year from July 15, 1924 to July 15, 1925 for further and continued education, no question then being raised or known by him of his rights under the joint resolution of June 7, 1924 or Section 21 of the Act of February 5, 1917; in each case the bond was duly given and as the petitioner owned a share and real estate in his father's estate, and his brothers, cousins and uncles were, and are, in this country, and have business in Connecticut and New York, there is no likelihood of his ever becoming a public charge, even if he lost his job as engineer at the school and could not have obtained another.

6. That on July 2, 1924, as your petitioner's time had been extended to July 15, 1925, the respondents through the Assistant Director General of Immigration, W. W. Sibray, who was in charge of the case, promised the petitioner, and it was entered into an agreement, that at the end of his extension on July 15, 1925, he would be given "an examination upon the expiration of his extended stay to determine whether he may be permitted to remain in this Country permanently".

7. That since July 15th, 1925, the respondents and their agents have refused to give your petitioner such an examination and have refused to extend his time temporarily and have refused to permit him to remain in the
4 United States and on the other hand they have given notice that they will, and they are threatening to, declare his bond forfeited, although there has been no default under the bond on the part of your petitioner, and

to issue a warrant for, and arrest, and hold in jail, or deport your petitioner to Russia in excess of the authority and jurisdiction of respondents and in violation of Section 21 and other sections of the Act of February 5, 1917 and the Joint Resolution of June 7, 1924.

8. That the joint resolution of June 7, 1924 is mandatory in requiring the permanent admission of your petitioner to this Country and the respondents have no discretion in the matter; that it would be an extreme hardship to have a warrant issued for and the arrest made or deportation of this petitioner enforced because of the facts set out hereinbefore and because it would be in violation of the agreement made by the said W. W. Sibray, Assistant Director General of Immigration; that under the law prior to the said joint resolution the respondents had authority to permit your petitioner to enter and to permanently remain in the United States, especially under Section 21 of the Act of February 5, 1917 and had no jurisdiction or authority to deport him.

9. That the said joint resolution was enacted for the purpose of permanently admitting all aliens temporarily admitted as well as those seeking admission under a misapprehension of the law and to save the United States of America the labor and expense of deporting them—it wiped the slate.

10. That the respondents contend that they have no authority or discretion to permit the petitioner to remain in the United States of America.

Wherefore, the premises considered, your petitioner prays:

5 (a) That the respondents may be made parties to the petition and required to answer same and that a rule issue requiring them to show cause, if any, they can, why a writ of prohibition should not issue, prohibiting and forbidding the respondents or either of them, their assistants, and attorneys from in any manner interfering with your petitioner, from interfering with his personal movements and business and affairs, from declaring his bond forfeited, from annoying him with notices that he must leave the Country or that he would be deported, from issuing any warrant for the arrest or for the deportation of your petitioner, from taking any proceedings to have your petitioner arrested or confined in jail or restraining him in

his liberty, from forcibly restraining and taking charge and removing or deporting your petitioner and from employing or requesting anyone else or any other Government official or attorney to do any of the foregoing acts.

(b) That such writ of prohibition set out in the foregoing prayer be granted and be permanent and perpetual.

(c) That your petitioner be granted a full and complete hearing and that all his rights be established and orders and decrees be entered, protecting him in his rights, liberty, and property, and that all such other and further relief may be granted as his case may require and may seem just and proper and that he be granted his costs.

And he will ever pray.

ARON POLISZEK, ALIAS
HARRY FISHBONE,
Petitioner.

RAYMOND M. HUDSON,
Attorney for Petitioner.

6 STATE OF CONN.,
County of New London:

I, Aron Poliszek alias Harry Fishbone, having been first duly sworn, depose and state that I have read the foregoing petition and that the facts set out therein are true and correct.

ARON POLISZEK, ALIAS
HARRY FISHBONE.

Subscribed and sworn to before me by Aron Poliszek alias Harry Fishbone this 10th day of September, 1925.

Given under my hand and seal this 10th day of September, 1925.

JOHN H. BARNES, [SEAL.]
Notary Public.

EXHIBIT "A".

U. S. Department of Labor, Immigration Service.

Know all men by these presents:

That we, American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, of 100 Broadway, New York, New York,

as Surety, are held and firmly bound unto the People of the United States of America, and of every State, Territory, county, town, municipality, or district thereof, in the full and just sum of five hundred dollars (\$500.00) as liquidated damages and not as a penalty to be paid to the United States or any State, Territory, county, town, municipality or district thereof, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of January, 1923.

Whereas Aron Poliszek, alien, aged twenty-four years, native of Melnica (Pinsk Region) who arrived at the Port of New York per steamship "Estonia" on the 22nd day of December, 1922, has applied to the Secretary of Labor for admission into the United States.

7 And Whereas the Secretary of Labor has, in his discretion, decided to temporarily admit the said alien into the United States upon the giving of a suitable and proper bond or undertaking containing the conditions hereinafter mentioned.

Now, therefore, the conditions of this obligation are such that (1) if the above bounden obligors shall, in case the said alien is admitted temporarily into the United States, jointly and severally, well and truly as long as the said alien remains in the United States, save harmless the United States, and every State, Territory, county, town, municipality, and district thereof, and every institution supported in whole or in part by public funds (Federal, State, Territorial, County, Town or Municipal) against said alien, becoming a public charge, and from any and all charges or expenses arising therefrom, whatsoever the cause may be and whether it arises prior to or subsequent to arrival in the United States; and (2) that the above bounden obligors, or either of them, shall submit to the Immigration Officer in Charge at the Port of New York, a written report within thirty days prior to the expiration of each six months period thereafter, respectively showing as to said alien (a) residence and occupation, and (b) whether said alien has been an inmate of a public institution during the period covered by said report and (3) if the said

alien shall depart from the United States, without expense to the United States, on or before the expiration of six months from the date hereof, and if the Commissioner of Immigration at the Port of New York shall receive from the above bounden obligors, at least five days prior to such departure, information as to date of sailing and name of vessel by which he will depart, then this obligation to be void; otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY
OF NEW YORK,

By C. A. STUMPF,

Resident Vice-President.

Attest:

G. E. HICK,

Resident Assistant Secretary.

Answer to Petition and Rule to Show Cause.

Filed September 22, 1925.

* * * * *

The answer of Robe Carl White, Acting Secretary of the Department of Labor of the United States of America, to the Petition for Writ of Prohibition and Rule to Show Cause filed and issued herein, without waiving any objection to any of the many imperfections appearing on the face of said Petition for Writ of Prohibition, respectfully represents to the Court as follows:

8 1 and 2. Respondent admits the allegations contained in Paragraphs 1 and 2 of said Petition except the allegation as to petitioner being a native of Russia. Answering that portion of the allegations of Paragraph 1, respondent says that he has no knowledge as to the place of birth of petitioner other than that the record of the hearing before the Board of Special Inquiry shows that petitioner arrived in this country in possession of a Polish passport bearing the notation by the American Consul "born in Pinsk Region."

3. Respondent having no knowledge of the facts set forth in Paragraph 3, is unable to answer the same.

4. Respondent admits that the reason for the temporary admission of plaintiff to this country was for the purpose

alone of allowing him to share in his father's estate, and that a bond was given conditioned that the plaintiff should depart from this country within six months from the 16th day of January, A. D. 1923, the date of said bond. Respondent has no knowledge as to whether the estate mentioned herein has been settled or not, nor has he any knowledge as to the attendance of the plaintiff in the Mystic Oral School for the Deaf, or as to the progress made in said school, or as to the earning capacity and habits of the plaintiff since his temporary admission into this country.

5. Respondent admits that on the 15th day of July, A. D. 1923 plaintiff's temporary admission was extended for one year, the surety on said bond agreeing to the extension, and that on the 15th day of July, A. D. 1924 plaintiff's temporary admission was again extended for one year, the surety on said bond again agreeing to said extension. Re-

9 spondent denies that the reason for the granting of said extensions was for the purpose of allowing the plaintiff to receive further education, but states that no definite reason was given for granting the said extension. The other allegations contained in said Paragraph 5 being argumentative and mere conclusions of law, respondent is advised by counsel no answer thereto is necessary.

6. Respondent admits that on the 2nd day of July, A. D. 1924, one W. W. Sibray, then Assistant Commissioner General of Immigration, did write a letter to one Walter J. Tucker, of the Mystic Oral School for the Deaf, Mystic, Connecticut, a correct excerpt from said letter being set forth in said paragraph. Respondent states however that the said Sibray had no right or authority under the laws and regulations to write the letter herein mentioned, nor was he authorized by the respondent herein, or any other proper official of the Department of Labor to write said letter, and that his action in so doing is not binding on the Secretary of Labor, or the respondent herein.

7. Respondent admits the allegations contained in Paragraph 7, except that portion thereof which avers that respondent is threatening to act in excess of the authority and jurisdiction of respondent and in violation of law. Respondent is advised by counsel that such allegations are

mere conclusions of law and no answer thereto is required.

8 and 9. Respondent is advised by counsel that the allegations contained in Paragraphs 8 and 9 are mere conclusions of law, and therefore no answer thereto is necessary.

10. Respondent admits the allegations contained in Paragraph 10.

Respondent, further answering the allegations of said Petition for Writ of Prohibition and Rule to Show Cause, avers:

10 A. That the petitioner, an alien, was upon arrival in this country excluded by a Board of Special Inquiry as a person suffering from a physical defect which affects his ability to earn a living, also a person likely to become a public charge, and a person unable to read; that upon appeal to the Secretary of Labor, the said decision of the Board of Special Inquiry was affirmed by the respondent, as Second Assistant Secretary of Labor, to whom was assigned by the Secretary of Labor the duty of deciding appeals in such cases; that the granting of the temporary admission and extensions thereof was in no sense a reversal of the excluding decision of the Board of Special Inquiry, but on the contrary was made under the authority of the Ninth Proviso, Section 3 of the Immigration Act of February 5, 1917.

B. Plaintiff is not entitled to any relief by Writ of Prohibition for that if arrested and ordered deported, the validity of such proceeding could be contested through a Writ of Habeas Corpus; that the plaintiff has an adequate and complete remedy with respect to the forfeiture of the bond, as the period within said bond is conditioned plaintiff should depart from the country, expired on July 15, 1925, and the rights of the United States Government arising due to the breach of the conditions of said bond having accrued the legality of the bond can be contested upon the entering of suit by the United States Government for the collection of the penalty for breach of the bond.

C. That the petition for injunction filed herein alleges no facts which, if true, would entitle petitioner to the relief prayed.

Respondent, having fully answered, prays that the Rule to Show Cause issued herein be discharged and the Petition

11 for Writ of Prohibition be dismissed, with his
reasonable costs in this behalf incurred.

ROBE CARL WHITE,
*Acting Secretary of the Department
of Labor of the United States of
America.*

PEYTON GORDON,
*United States Attorney in and
for the District of Columbia.*

LEO A. ROVER,
*Assistant United States Attorney
in and for the District of Columbia.*

ALBERT E. REITZEL,
Assistant Solicitor, Department of Labor.

DISTRICT OF COLUMBIA, ss:

I, Robe Carl White, being first duly sworn according to law depose and say: That I have read the foregoing Answer by me subscribed and know the contents thereof, that the facts stated therein as of my personal knowledge are true, and those stated on information and belief I believe to be true.

ROBE CARL WHITE.

Subscribed and sworn to before me this 21st day of September, A. D. 1925.

[SEAL.]

S. J. GOMPERS.

My commission expires March 13, 1930.

Demurrer to Answer.

Filed September 25, 1925.

* * * * *

Now comes the petitioner and for demurrer to the answer says the answer is not sufficient in law and assigns points for argument as follows:

1. The answer states facts and makes admissions showing petitioner was admitted under Sect. 21 of the Act of Feb. 5, 1917.

12 2. The answer states facts and makes admissions showing that if petitioner was only admitted tem-

porarily, then he has an absolute right to remain by virtue of the Joint Resolution of June 7, 1924.

3. The answer does not set out a defense.

RAYMOND M. HUDSON,
Attorney for Petitioner.

Supreme Court of the District of Columbia.

Friday, September 25th, 1925.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice, presiding.

* * * * *

Before Judge Bailey.

Comes now as well the petitioner by his attorney of record as the respondents by Leo A. Rover, Esqr., Assistant U. S. Attorney, whereupon petitioner's demurrer filed to respondents' answer to the petition being considered, is hereby overruled. Upon motion petitioner is hereby granted leave to file a traverse to said answer within five days hereof.

Traverse and Joinder of Issue to Respondent's Answer.

Filed October 1, 1925.

* * * * *

1. Petitioner for traverse and joinder in issue of the answer says that the statements in the said answer are conclusions of law and not such facts as necessitate a denial, but so far as they are contrary to the allegations of the petition are hereby denied, and issue is joined on same.

2. That the statements that petitioner was only admitted temporarily and not under section 21, of the act of 13 February 5, 1917, are mere conclusions of law, not necessary to be denied, but as far as same may be taken, as alleged, as facts same, and each of same, is hereby denied, and issue is joined on same.

RAYMOND M. HUDSON,
Attorney for Petitioner.

To the Attorneys for Respondents:

If no demurrer or motion is filed to the above traverse and joinder within five days after filing of same, then the Court will be asked to set this action for trial.

RAYMOND M. HUDSON,
Attorney for Petitioner.

Demurrer to Traverse.

Filed March 16, 1926.

* * * * *

By leave of Court first had and obtained, now come the respondents and demur to the Traverse of petitioner filed herein and for grounds thereof say,

1. The facts stated in said Traverse do not entitle the petitioner to the relief prayed for.

2. The facts stated in said Traverse do not constitute in law sufficient reply to the Answer of respondents filed herein.

3. And for such other grounds as may be urged at the hearing of this demurrer.

PEYTON GORDON,

United States Attorney.

LEO A. ROVER,

Assistant United States Attorney.

A. E. REITZELL,

Assistant Solicitor, Department of Labor.

(Fiat.)

Let this Demurrer be filed forthwith.

W. HITZ,

Justice.

16 Oct., 1926.

14 Supreme Court of the District of Columbia.

Friday, August 15th, 1930.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice, presiding.

* * * * *

On motion of the plaintiff it is ordered by the Court this 15th day of August, 1930, that its order herein of June 20, 1930 be and the same is hereby vacated and set aside, and thereupon on motion of the attorney for the defendants, the Court being of opinion that a Petition for a Writ of Prohibition is not the proper remedy for determining the rights of the plaintiff as alleged it is ordered by the Court that the defendants' demurrer to the plaintiff's traverse be and is hereby sustained, without prejudice in any

proper proceeding plaintiff may institute to determine his rights.

Thereupon the plaintiff by his attorney now in open court says that he does not wish to amend his petition or traverse but will stand on the same as filed.

Wherefore it is ordered that said petition of the plaintiff be dismissed with costs, and that the plaintiff take nothing by this action and that defendants go hence without day.

From the foregoing judgment the plaintiff by his attorney in open court notes an appeal to the Court of Appeals; Whereupon the cost bond is fixed at \$100.00 or a cash deposit of \$50.00 in lieu thereof for the costs on such appeal.

Memorandum.

September 9, 1930.—\$50 deposit in lieu of Bond on appeal.

15

Assignments of Error.

Filed August 15, 1930.

* * * * *

Now comes the plaintiff and makes and files the following assignments of error on appeal to the Court of Appeals of the District of Columbia, to wit:

1. The Court erred in sustaining the defendants' demurrer to the traverse of plaintiff to the answer, and then dismissing the petition.

2. The Court erred in holding that plaintiff is not entitled to assert his rights in a petition for a Writ of Prohibition but must wait until the threatened illegal warrant of deportation is issued, which is beyond the jurisdiction of the defendants to issue, and plaintiff is then arrested thereunder, and will then be restricted to a petition for a Writ of Habeas Corpus to assert his rights against the defendants for exceeding their jurisdiction.

3. The Court erred in not holding that plaintiff was admissible under section 21 of the Immigration Act of 1917, (39 Stats. 891) and having been admitted under that section by the Secretary in his discretion and bond thereunder taken by the Secretary (a) now plaintiff cannot be deported; (b) the Secretary has no jurisdiction to forfeit his bond nor to issue a warrant for his deportation, as it is

admitted plaintiff has not become, nor is he likely to now become a public charge.

4. The Court erred in failing to hold that deaf mutes are not barred by the statute, but only feeble-minded and that deaf mutes are not feeble-minded.

5. The Court erred in failing to hold that under section 4 of the Joint Resolution of June 7, 1924, (a) the defendants had no jurisdiction to issue a warrant of deportation against plaintiff, (b) that plaintiff could remain in the United States, and not be deported thereafter, and (c) that said Resolution removed any right, if there was such right, which is denied, to deport plaintiff at any time.

6. The Court erred in failing to hold that section 3 of the Act of 1917, which is the excluding section, did not exclude plaintiff or make him "otherwise inadmissible."

7. The Court erred in not granting the final Writ of Prohibition against the defendants as prayed for by plaintiff.

8. The Court erred in overruling plaintiff's demurrer to the answer.

RAYMOND M. HUDSON,
Attorney for Plaintiff.

Designation of Record.

Filed August 15, 1930.

* * * * *

Now comes the plaintiff and makes and files this designation of the record and directs the clerk to include in the transcript on appeal the following documents and papers:

1. Petition and exhibits.
2. Answer to same.
3. Demurrer to answer.
4. Order overruling demurrer.
5. Plaintiff's Traverse to answer.
6. Defendants' demurrer to traverse.
7. Order of August 15, 1930 sustaining demurrer to traverse and dismissing petition.
8. Assignments of Error.
9. This Designation of the Record.

RAYMOND M. HUDSON,
Attorney for Plaintiff.

17 To Leo A. Rover, Esq.,
U. S. Attorney:

Take notice that on September 15, 1930, I will apply to the Clerk of the Supreme Court of the District of Columbia for a transcript of the record on appeal to the Court of Appeals on the foregoing Designation of Record.

RAYMOND M. HUDSON,
Attorney for Plaintiff.

18 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 17, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 70591 at Law, wherein Aron Poliszek alias Harry Fishbone is Petitioner and James J. Davis, Secretary of the Department of Labor of the United States et al. are Respondents, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of October, 1930.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5322. Aron Poliszek, alias Harry Fishbone, appellant, vs. William N. Doak, Secretary of the Department of Labor of the United States of America, et al. Court of Appeals, District of Columbia. Filed Nov. 18, 1930. Henry W. Hodges, Clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

Court of Appeals MAY 11 1931

OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1931.

Henry W. Hodges
CLERK.

No. 5322.

ARON POLIZEK alias HARRY FISHBONE,

Appellant,

v.

WILLIAM N. DOAK, Secretary of the Department of
Labor of the United States of America, and/or ROBE
CARL WHITE, Acting Secretary of the Department
of Labor of the United States of America,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

APPELLANT'S BRIEF.

RAYMOND M. HUDSON,

Attorney for Appellant,

Washington, D. C.

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Court of Appeals
OF THE DISTRICT OF COLUMBIA.
JANUARY TERM, 1931.
No. 5322.

ARON POLIZEK alias HARRY FISHBONE,
Appellant,
v.

WILLIAM N. DOAK, Secretary &c., *et al.*,
Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the District of Columbia entered August 15, 1930, sustaining a demurrer to the traverse to the answer to a petition of appellant for a Writ of Prohibition against the Secretary and/or Acting Secretary of Labor (R. 12). Appellant elected to stand on petition and traverse.

Appellant a native Russian Jew at the age of 23 arrived from Russia December 22, 1922 and being admissible he was admitted January 11, 1923, under Section 21 of the Act of February 5, 1917 (39 Stats. 891) and he executed and filed the bond (R. 5) required by that section for aliens likely to become a public charge; but the

Department contends it was a temporary admission; appellant filed all the reports required by Section 21 (R. 1, 2).

After appellant sailed from Russia in 1922 and before he arrived, his father who was a resident of the State of Connecticut, having a business, and owning real estate therein, died, and as all of appellant's brothers and sisters were admitted to the United States and were living and in business in the United States, as well as all of his relatives, and his mother being dead, he had no relatives outside of the United States (R. 2).

As appellant was a deaf and dumb mute, physically unable to read and write, a blacksmith by trade, and had no relatives outside of the United States and had a share in the real estate and other estate of his deceased father in Connecticut, he was because of the hardships of the case, admitted under such bond, to protect the United States and the several states from appellant becoming a public charge and the bond was given, and regularly renewed, and appellant immediately entered the Mystic Oral School for the Deaf, Walter J. Tucker, Superintendent, Mystic, Connecticut, being a state institution, where he is still (1926) such a student, and employed, as he has learned to read and write in both English and Hebrew, and has become a plumber and engineer and the institution gives him his board and lodging and a certain amount of additional schooling each day and further pays him a sum of \$40 per month for his services; that the school has certified that he is a valuable man to the school, will not become a public charge, is able to earn his living anywhere and capable of saving his earnings, and that he is an exceptional

young man of clean habits, honest and ambitious, and having made reasonable progress in his work, it would be a detriment for him to have to leave now, as he being deaf and dumb, can get along with and understand and help the other students who are likewise deaf mutes, better than can those you can hear and talk and do not understand the condition of mutes.

On July 15, 1923, appellant's time was extended for one year for the purpose of further education on like bond being given, which was given and in June, 1924, appellant's time was again extended for one year from July 15, 1924, to July 15, 1925, for further and continued education, no question then being raised or known by him of his rights under the joint resolution of June 7, 1924, or Section 21 of the Act of February 5, 1917; in each case the bond was duly given and as the appellant's owned a share and real estate in his father's estate, and his brothers, cousins and uncles were, and are, in this country, and have business in Connecticut and New York, there is no likelihood of his ever becoming a public charge, even if he lost his job as engineer at the school and could not have obtained another.

On July 2, 1924, as appellant's time had been extended to July 15, 1925, the appellees through the Assistant Director General of Immigration, W. W. Sibray, who was in charge of the case, promised the appellant, and it was entered into as an agreement, that at the end of his extension on July 15, 1925, he would be given "an examination upon the expiration of his extended stay to determine whether he may be permitted to remain in this country permanently" (R. 3).

The appellees and their agents have refused

to give appellant such an examination and have refused to extend his time temporarily and have refused to permit him to remain in the United States and on the other hand they have given notice that they will, and they are threatening to, declare his bond forfeited, although there has been no default under the bond on the part of appellant, and to issue a warrant for, and arrest, and hold in jail, or deport appellant to Russia in excess of the authority and jurisdiction of appellees and in violation of Section 21 and other sections of the Act of February 5, 1917 and the Joint Resolution of June 7, 1924.

The Joint Resolution of June 7, 1924, is mandatory in requiring the permanent admission of appellant to this country and the appellees have no discretion in the matter; that it would be an extreme hardship to have a warrant issued for and the arrest made or deportation of this appellant enforced because of the facts set out hereinbefore and because it would be in violation of the agreement made by the said W. W. Sibray, Assistant Director General of Immigration; that under the law prior to the said Joint Resolution the appellees had authority to permit appellant to permanently remain in the United States, especially under Section 21 of the Act of February 5, 1917, and had no jurisdiction or authority to deport him.

The said Joint Resolution was enacted for the purpose of permanently admitting all aliens temporarily admitted as well as those seeking admission under a misapprehension of the law and to save the United States of America the labor and expense of deporting them—it wiped the slate.

Appellant owns a one-sixth interest in his father's undivided estate, which is worth some \$20,000, of which there is a house and about one hundred acres of land, on which he now lives with his brothers and sisters, which is worth about \$7,000. Since this action was instituted the appellant has secured a better position and is now (1928) earning \$20 a week as a blacksmith and he lives with his brothers and sisters.

Appellant is a native Russian, a subject of the Russian Government, whatever that is, and the Government cannot now deport him to Russia, as is well known, and as was held by Judge Anderson in the United States District Court in *Bender v. Johnson, Commissioner*, 5 Fed. (2d) 238, decided April 28, 1925, the Court stating that they could not deport the alien and could not keep him locked up waiting for conditions to change so that he might be deported to Russia.

The answer, except such portions as are conclusions of law admit practically all the allegations of the petition, but the Court overruled a demurrer to the answer; thereupon appellant filed a traverse to which appellees' demurrer was sustained, and appellant electing to stand on his petition and traverse, the action was dismissed and writ denied on a question of jurisdiction and not on the merits of the petition (R. 12).

Assignments of Error.

1. The Court erred in sustaining the defendants' demurrer to the traverse of plaintiff to the answer, and then dismissing the petition.

2. The Court erred in holding that plaintiff is not entitled to assert his rights in a petition

for a Writ of Prohibition but must wait until the threatened illegal warrant of deportation is issued, which is beyond the jurisdiction of the defendants to issue, and plaintiff is then arrested thereunder, and will then be restricted to a petition for a Writ of Habeas Corpus to assert his rights against the defendants for exceeding their jurisdiction.

3. The Court erred in not holding that plaintiff was admissible under Section 21 of the Immigration Act of 1917 (39 Stats. 891) and having been admitted under that section by the Secretary in his discretion and bond thereunder taken by the Secretary (a) now plaintiff cannot be deported; (b) the Secretary has no jurisdiction to forfeit his bond nor to issue a warrant for his deportation, as it is admitted plaintiff has not become, nor is he likely to now become a public charge.

4. The Court erred in failing to hold that deaf mutes are not barred by the statute, but only feeble-minded and that deaf mutes are not feeble-minded.

5. The Court erred in failing to hold that under Section 4 of the Joint Resolution of June 7, 1924, (a) the defendants had no jurisdiction to issue a warrant of deportation against plaintiff, (b) that plaintiff could remain in the United States, and not be deported thereafter, and (c) that said Resolution removed any right, if there was such right, which is denied, to deport plaintiff at any time.

6. The Court erred in failing to hold that Section 3 of the Act of 1917, which is the exclud-

ing section, did not exclude plaintiff or make him "otherwise inadmissible".

7. The Court erred in not granting the final Writ of Prohibition against the defendants as prayed for by plaintiff.

8. The Court erred in overruling plaintiff's demurrer to the answer.

Points on Admission Under Section 21.

1. Answer (R. 9) par. A., says excluded by Board of Special Inquiry as suffering from "physical defect which affects his ability to earn living, also person likely to become public charge." This is exactly Sect. 21.

2. Sect. 21 provides for admission of such alien on giving bond, which bond is the one actually given in this case (R. 5).

3. Rule 14, Subd. C. (p. 136) provides for the Board of Special Inquiry to decide on admission under Sect. 21 of such alien, just as it did here, and then provides in last line: "An alien rejected on said ground is entitled to Appeal." Petitioner did appeal as so provided and the Secretary then admitted him on the bond attached to petition which it is admitted is the form established and used under Sect. 21.

4. Rule 12, Subd. C. (p. 135) provided for the bond and also provided alien could apply to the Board and then appeal to the Secretary or could apply direct to the Secretary.

5. The Fink case overrules respondent's contention that Sect. 3 as to non-reading deaf mutes controls here and also that deaf mutes are not feeble-minded.

6. Rule 12, Subd. B. (on p. 135) provides for "alien mandatorily excluded seeking temporary admission" for medical treatment and then further provides: "All other applications for temporary admission made by the mandatorily excluded class not herein provided for shall be submitted to the Department for special ruling."

Points on Temporary Admission.

1. Every alien has always been, and is, admissible unconditionally and absolutely as a matter of right, unless prevented by some specific treaty or statute.

2. No alien's admission can be limited or made temporary unless he is prohibited from unconditional, general or absolute admission.

3. It is only where an alien is not "otherwise admissible"—not entitled to unconditional or general admission that he can be "admitted temporarily". This is recognized in the Committee report on the Joint Resolution.

4. It is a contradiction of terms to say an alien is "otherwise admissible" and at the same time also "temporarily admissible".

5. An alien cannot be considered for temporary admission until it is determined that he is not "otherwise admissible". Therefore, the 4th Clause of the

Joint Resolution is absolutely and entirely null, void, and meaningless if it is qualified by the words "otherwise admissible" in the first sentence.

6. If the words "otherwise admissible" in line 6 of the joint resolution could be construed to apply to the 4th clause of the resolution, then the 4th clause would be meaningless as the Secretary has no jurisdiction or authority to limit and restrict an admission to "temporary admission" when the alien is "otherwise admissible", for if he is "otherwise admissible" the admission is permanent and not limited or temporary. The resolution, as remedial legislation, must be so construed as to give effect and meaning to each and every word and clause thereof, and liberally construed in favor of the alien, whom Congress intended to benefit by the remedial legislation.

Argument.

I.

Appellant was admitted under Section 21 and is not deportable.

Appellant was a blacksmith when he entered, and had been, and still is, making a living, and the second division of Section 3 of the Act of February 5, 1917 (39 Stats. 981), which takes effect three months after the act, only excluded those who were "physically capable" to, but could not, read English or some other language, but as this plaintiff was not "physically capable" of reading, being deaf and dumb at the time, he consequently was not excluded by that clause.

There is no clause or division in Section 3, which is the excluding section of the Act, which excludes this petitioner or makes him otherwise inadmissible. It is contended that the 9th class of aliens excluded under Section 3 applies to this plaintiff, but this clause is not applicable as will be clearly seen from reading it, it being as follows:

“Persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such a lien to earn a living.”

The admitting Section 21 specifically and clearly covers this alien by its sentences (39 Stats. 891):

“Sec. 21. That any alien liable to be excluded because *likely to become a public charge* or because of *physical disability other than* tuberculosis in any form or a loathsome or dangerous contagious disease may, if otherwise admissible, *nevertheless be admitted* in the discretion of the Secretary of Labor upon the giving of a suitable and proper bond or undertaking approved by said Secretary, in such amount and containing such conditions as he may prescribe, to the United States, and to all States, Territories, counties, towns, municipalities, and districts thereof, holding the United States and all States, Territories, counties, towns, municipalities, and districts thereof harmless against such alien becoming a public charge * * *

It was because of this clause, "likely to become a public charge", and because the appellant was thought likely to become a public charge or because of his physical disability that a bond was required to save the Government harmless from his becoming a public charge, and then in addition the bond, Exhibit "A", provides for reports as required by subdivision C of Rule 12, which is applicable only to admissions under Section 21, and is as follows:

"An alien seeking admission under the provisions of section 21 of the act of February, 1917, shall make application therefor to the department *either on appeal from an excluding decision of a board of special inquiry or direct*, and shall *in either case* show in such application that a bond with approved surety or collateral in the penal sum of not less than \$500, conditioned as required in said Section 21, has been furnished or that in lieu of such bond cash of not less than \$500 or postal money order of like amount has been deposited for the purposes and subject to the conditions prescribed in said section. *Upon receipt of such application the department may in its discretion authorize the admission of such alien: Provided, That reports concerning such alien may be required at stated intervals, and in default of which alien may be deported.*"

When the Board refused the alien admission, as it did in this case, according to the answer, he had a right to apply to the Secretary, which he

did and the Secretary admitted him under Rule 14, subdivision C, which is as follows:

“When an alien is certified for a physical defect other than tuberculosis in any form or a loathsome contagious or dangerous contagious disease the board of special inquiry must decide, on the basis of all the evidence (including the certificate), whether or not such certified defect may affect his ability to earn a living. An alien rejected on said ground is entitled to appeal.”

The 9th proviso of Section 3 simply provides for rules by the Commissioner General for temporary admission, and Rule 12, subdivision B, provides for temporary admissions of “aliens mandatorily excluded” for medical treatment under bond and then states:

“All other applications for temporary admission made by the mandatorily excluded class not herein provided for shall be submitted to the department for special ruling.”

Neither the statute nor the rules require any reports but the bond in this case specifically requires reports every six months without any limitations as to length of time, and on its face clearly it was given under Section 21 of the Act of February 5, 1917, under which the alien was admitted and subdivision C of Rule 12 requires reports as set out in the bond given by appellant.

Section 21 specifically and clearly covers this alien by its sentence “because likely to become a public charge or because of physical disability” in the first and second line of the section.

Either way you take it, as a temporary admission as contended by the Government, then the joint resolution was all inclusive and admits permanently every prior temporary admission as there can be no legal temporary admission if the alien was *otherwise admissible*, because the statute and rules specifically provide for temporary admission only when the alien is otherwise inadmissible or as the rule says "mandatorily excluded".

As on the other hand if the alien was admitted under Section 21, as contended and as is borne out by requiring reports and the record, then there is no provision whatever for deporting him at any time unless he could be deported under the last clause of subdivision C of Rule 12, for failing to make a report, but reports were all made promptly and regularly at all times.

The second part of Section 3 on page 6, Act of February 5, 1917, does not prohibit admission for it excepts from the prohibition those physically unable to read or write.

II.

If appellant was only admitted temporarily then his deportation is prohibited by the joint resolution of June 7, 1924, Section 4.

Section (4) of the joint resolution set out below is remedial legislation, which must be liberally construed, and it covers all aliens duly admitted temporarily and is not qualified or restricted by the words in the first part of the resolution "if otherwise admissible", because there is no such thing as a "temporarily admitted alien" who was "otherwise admissible", because *only those who*

are not admissible can be legally admitted temporarily. The resolution is as follows:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following aliens arriving in excess of quotas fixed under authority of the Act entitled ‘An Act to limit the immigration of aliens into the United States’, approved May 19, 1921, as amended and extended, may, if otherwise admissible and if not subject to deportation for other causes, be permitted to enter and remain in the United States without regard to the provisions of such Act of May 19, 1921, as amended and extended:

(1) Aliens heretofore admitted in excess of quota and charged to the quota of a later month;

(2) Aliens heretofore admitted under a construction of such Act of May 19, 1921, required by court decision;

(3) Aliens arriving in the United States after May 26 and before July 1, 1924, who departed for the United States from the last port outside the United States or outside foreign contiguous territory on or before May 26, 1924, believing in good faith that they would be admitted pursuant to a construction of such Act of May 19, 1921, required by court decision; and

(4) ALIENS HERETOFORE TEMPORARILY ADMITTED UNDER BOND TO RELIEVE CASES OF EXTREME HARDSHIP.

Approved, June 7, 1924.”

Appellant contends that Congress in the joint resolution intended to "wipe the slate" as of June 7, 1924, and to permit all who had come in before that time to remain permanently unless there were other causes for deportation.

The Assistant Secretary of Labor, Mr. White, at that time wrote a letter to the Committee, advocating a resolution covering a great many more aliens and showing the necessity for same, and the Committee granted that and added to it other "aliens heretofore temporarily admitted under bond to relieve cases of extreme hardship", and in its report, on which the resolution as amended was passed, the Committee said:

"In addition to the above, there are approximately 200 aliens whose admission temporarily under bond has been effected solely to relieve unusual distress. *They have been temporarily admitted* because in the circumstances deportation would have been cruel or inhuman, and *there existed no authority of law for their unconditional admission*. They should be removed from the shadow of the threat of deportation."

Again:

"The committee is of opinion that the relief provided by this resolution should be extended. The act of May 19, 1921, now superseded by the act of May 26, 1924, has been properly and rigorously enforced. It is through no fault of officers of the administrative branch of the Government that this problem remains to be disposed of.

Failure to dispose of it will mean hardship to certain aliens, but more than that it may mean embarrassment to the Government. It will be the part of wisdom by this resolution *to wipe out all mistakes* of the past, whether legislative, executive, judicial, in order that the administration of the new immigration law may proceed without hindrance. There is no possibility that such difficulties will arise under the new act."

The Court's attention is called to the case of *Pauline Fink v. Tod, Commissioner*, which was No. 698, October Term, 1924, in the Supreme Court of United States, and which was reversed without an opinion by the Solicitor General entering a confession of error after the former Solicitor General had filed the brief.

This confession of error evidently was because the Solicitor General believed that *Lane v. Mickadist*, 241 U. S. 206, 36 Sup. Ct. 599, was applicable.

Fink was a deaf and dumb mute and the case is quite similar to the instant case and the Supreme Court allowed the alien to remain in this country by its reversal.

Fink's brief stated, page 3:

"Relator arrived in the United States on November 29, 1920, accompanied by her father and five sisters and brothers and was then in her thirteenth year, having been born in Poland, April 15, 1908 (fol. 4; not denied in return and established by the evidence, fols. 673-676 and found by the

C. C. A., p. 245). *She is a deaf-mute, and became such in her second year, as a consequence of an attack of typhus, and there was no opportunity for her to receive any education whatever in Poland, because of the absence of institutions for deaf-mutes in the little place from which she came, though she had learnt before arrival here to help herself and make herself useful by performing various household duties and doing simple sewing (fols. 677, 637-638; all practically found by the C. C. A.; p. 245)."*

Again page 3:

"Deaf-mutes are not barred by the statute, but feeble-minded persons are. The other members of the family arriving were also excluded by the Board of Special Inquiry, as likely to become public charges, relator solely on the medical certificate as feeble-minded; and because she was found to be helpless, her father was excluded also, to accompany her back to Poland, or furnish a substitute (fols. 691-692; compare fols. 625-627, 629-30, 621)."

And again page 39:

"POINT I.

The Certificate of the Washington Medical Board of Appeals against feeble-mindedness is final and conclusive, and under the statute and regulations applicable, vacated all prior certificates. Under the regulations applicable, and general principles of law, the Secretary of Labor, a layman, had

no authority to choose, as between this last lawful medical certificate and prior, superseded, certificates, as suggested in the District Court opinion (fols. 699-702). The Circuit Court of Appeals erred in denying the Secretary's right to order a medical rehearing with the approval of the Surgeon General and in invalidating the Surgeon General's regulations so authorizing."

The Government's brief stated page 1:

"Relator, a Polish alien, arrived at New York on November 29, 1920, in company with her father and four of her brothers and sisters. Her mother had preceded the rest of the family and had been living in this country for seven years. Relator, at the time of her arrival, was about thirteen years old; and she had been a *deaf mute* since the age of two."

Again page 2:

"However, on the order of the Acting Secretary of Labor, the relator *was temporarily admitted under bond*, and has since then been in attendance at a public school for the deaf in New York City. Her admission was originally for a period of six months only; but various extensions and delays followed, due in part to operations and treatment which she underwent."

And again page 3:

"March 22, 1923 (Drs. Guthrie, Kolb, and Williams). This board sat at Washington

under orders of the Surgeon General. It certified:

That this alien is not feeble-minded and the certificate of feeble-mindedness previously issued in her case is withdrawn. This alien is suffering from deafmutism, a condition which may affect her ability to earn a living (Rec. Tr., p. 123)."

The decision of the Circuit Court of Appeals I. F. (2d) 247, which was reversed by the Supreme Court of the United States, stated at page 247:

"The language is: 'That the following classes of aliens shall be excluded.' And among the classes so to be excluded are 'feeble-minded persons'. Persons afflicted with deaf-mutism are not expressly mentioned in the statute."

Again page 253:

"The word 'final', as we understand it, in the connection in which it is used in the sections now under consideration, is that it is conclusive upon the board of special inquiry and conclusive upon the Secretary of Labor."

And at pages 258 and 259 the Court held the findings of the Board as final and conclusive on the Secretary but this is reversed by the Supreme Court evidently on *Lane v. Mickadist*, above.

Under this decision the Government cannot deport Fishbone.

A report was published in the New York papers of the following case two or three years ago.

Judge Inch in the Federal Court in Brooklyn vacated yesterday a warrant of deportation against Carmela Cosimano, wife of a gardener in Glen Cove, and ordered her returned to the Kings Park State Hospital for continued treatment for mental disorder. She came to this country in June, 1921, and last April was committed to the hospital for observation.

On Sept. 12, 1924, the State Hospital Commission received a report from the hospital that the woman was insane. Subsequently the Secretary of Labor issued a warrant for her deportation as an undesirable alien.

The action heard before Judge Inch was under a writ of habeas corpus to vacate the warrant. Casimano testified that he had borne the entire expense of his wife's commitment to the hospital and had paid her doctor's bill. It was shown that the patient had never been a public charge. Under these circumstances the Court decided that she could remain in this country and that her treatment should be continued.

Any attempt of the officials to deport this man would be in excess of their authority under the joint resolution, which is hereinbefore set out and also in excess of their authority under Section 21 of the Act of February 5, 1917, and other sections of that Act, and it has been held by all the Federal courts, including this Court, that any excess of authority of an official can be prevented and stopped by a writ of prohibition in an action at law or be enjoined in equity.

III.

Prohibition is the proper legal remedy to prevent forfeiture of bond and arrest and deportation and appellant can not be forced and relegated to the semi-criminal or quasi-criminal writ of habeas corpus.

This Court issued a writ of prohibition to the Municipal Court in *Porter v. Gardner*, 51 App. D. C. 154, and stated the rule as follows:

“The power of this court, in aid of its jurisdiction, to issue the writ of prohibition, designed to keep inferior courts within the limits and bounds prescribed to them by law and issued in the exercise of sound judicial discretion according to particular circumstances, is established. *In re MacFarland*, 30 App. D. C. 365. It plainly appearing that the municipal court is proceeding beyond the limits and bounds prescribed, the writ should not be withheld merely because this court, in the exercise of its discretion, might grant a writ of error to the municipal court after an unnecessary proceeding there.”

Again :

“In *Deffer v. Kimball*, 7 App. D. C. 499, alluded to by counsel for respondent, the relators, after a trial in the police court, where ‘they took their chances of acquittal on the facts of the case, and were convicted’, the writ was withheld. The difference between that case and this is too plain

to require further comment. In *Holmead v. Barnard*, 29 App. D. C. 431, it was not clearly shown that the court below was exceeding its jurisdiction, and, moreover, it did appear that the petitioner had a more beneficial remedy by way of appeal. In *re Dahlgren*, 30 App. D. C. 588, there were no circumstances from which this court could say that the remedy by appeal, which was open to complainant, was inadequate."

The writ of prohibition was granted to the Commissioners in *In re MacFarland*, above, because they had no right of appeal, from the proposed valuation of the gas company's properties.

Appellant likewise has no right of appeal, nor is there any appeal from the decision of the Secretary of Labor; if he goes ahead and forfeits the bond, the appellant will have to bring one action to protect his collateral and the bonding company and have the forfeiture vacated and set aside, and an entirely separate and distinct action—an action for a writ of habeas corpus to prevent his deportation, which is a semi-criminal or quasi-criminal action, in addition to having to submit to arrest and giving another bond for bail.

The writ of prohibition prayed will avoid all of this litigation, expense, delay and humiliation, as well as sustain the confidence of the masses in the courts; it is very important that our foreign element, whether naturalized or not, shall at all times have confidence in our courts.

The United States Supreme Court held in *Smith v. Whitney* that the Naval Court-martial had jurisdiction of the charges and denied the writ of prohibition, but declined to decide whether prohibi-

tion should issue where the Court-martial was without jurisdiction and said:

“A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari to correct mistakes of that court in deciding any question of law and fact within its jurisdiction.” *Smith v. Whitney*, 116 U. S. 167, 176; 29 L. ed. 601, 604, 6 Sup. Ct. Rep. 570.

The above is quoted in *Morris v. Scott*, 25 App. D. C. 89, where the writ of prohibition was denied against Police Court but the Court of Appeals suggested that Police Court should suspend further prosecution until the validity of the questioned regulation for removing snow was determined.

Appellant is not seeking a review of any decision of appellees—they have made none; appellant is seeking to prohibit them from forfeiting a bond and issuing a warrant of arrest and deportation in a matter where they have no jurisdiction to act.

“The writ of prohibition, though it may be of right in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court, is not a writ of course, like a writ of summons in an ordinary action, but is a subject of a special application to the court upon affidavit. *City of London v. Cox*, L. R. 2 H. L. loc. cit. 253.

In Blackstone's Commentaries, the grievance to be remedied by prohibition is stated to be that of encroachment of jurisdiction, or calling one *ceram non judice* to answer in a court that has no legal cognizance of the cause. *States ex rel. Anheuser-Busch Brewing Ass'n v. Eby*, 71 S. W. 58, 60, 170 Mo. 497." 6 Words and Phrases, First Series, 5672.

"The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Rev. Codes, H. D. 1899, Sec. 6125; Code Civ. Proc. S. D. 1903, Sec. 777; Rev. St. Utah 1898, Sec. 3634; Code Civ. Proc. Cal. 1903, Sec. 1102." 6 Words and Phrases, 5672, First Series.

"Where there is no appeal from the officer sought to be prohibited, the writ is naturally as of right, but where there is such appeal then the writ is discretionary.

"While 'prohibition' is similar to the remedy by injunction against proceedings at law, the object in each case being restraint of legal proceedings, an 'injunction' is directed only to the parties litigant, and prohibition is directed to the court itself, commanding cessation of exercise of jurisdiction to which it has no legal claim. The right to prohibition implies that a wrong is about to be committed, not by the parties litigant, but by the person or court assuming to exercise judicial power, and against

whom the writ is asked. *State ex rel. Terminal R. Ass'n of St. Louis v. Tracy*, 140 S. W. 888, 890, 237 Mo. 100, 37 L. R. A. (H. S.) 448.

“Mandamus is a legal remedy to compel action in accordance with legal duty, while ‘prohibition’ is a legal remedy to restrain action in excess of legal authority.” *State ex rel. Peyton v. Ross*, 81 Pac. 865, 867, 39 Wash. 399 (quoting and adopting definition in *Dunklin County v. Dunklin County District Court*, 23 Mo. 454). 3 Words and Phrases, Second Series, 1256.

In *U. S. v. Sing Tuck*, 194 U. S. 161 the alien had not been admitted to the United States, nor had the Secretary of Labor on appeal denied him admission and the Court denied him a writ of habeas corpus on the mere allegation he was a citizen and stated, page 170:

“We agree with the circuit court of appeals that a petition for habeas corpus ought not to be entertained unless the court is satisfied that petitioner can make out a *prima facie* case. A mere allegation of citizenship is not enough.”

While the Chinamen were in the house of detention, yet they could get out by returning to Canada from where they attempted to enter, or rather sought admission; this case although relied on by the appellees is not applicable.

Lidonnici v. Davis, Secy., 57 App. 36, was an equity suit after full hearing and decision by Secretary alleging abuse of discretion and was

not a matter of jurisdiction; also he did not come with clean hands.

Georgian v. Uhl, 271 Fed. 676, merely is a dictum that habeas corpus is the only remedy, but there was no question of jurisdiction; this case and the one above are relied upon by appellees but neither is relevant.

In *Noble v. Union River Logging Company*, 147 U. S. 170, 13 Sup. Ct. 271, Mr. Justice Brown said:

“If he (the Secretary of the Interior) has no power at all to do the act complained of, he is as much subject to an *injunction* as he would be to a *mandamus* if he refused to do an act which the law plainly required him to do.”

In *Philadelphia Co. v. Stimson*, *Secretary of War*, 32 Sup. Ct. 340, 223 U. S. 605 (affirming 33 Apps. 338), an injunction was sought to restrain the Secretary of War from starting criminal proceedings, which was granted, the Court holding that where officers exceeded their authority, an injunction would lie, and stated:

“The principle has frequently been applied with respect to state officers.”

“And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble v. Union, etc., Co.*, 147 U. S. 165, 13 S. C. 271; *American School McAm.*, 187 U. S. 94, 23 S. C. 33.”

In *Garfield v. Turner*, 31 Apps. at 337, the Court said:

“A court will restrain by injunction the performance of an unlawful act, or command by writ of mandamus the performance of a lawful act.”

Hammer v. Dagenhart, 247 U. S. 261 at 38 :
38 Sup. Ct. 529 at 532, held that excess of authority by an official because of a statute being unconstitutional could be enjoined, whereas it was made a crime to violate the law.

In *Kennington v. Palmer*, 258 U. S. 100, 41 Sup. Ct. 303, the Court enjoined the attorney general from prosecuting under the Food Administration Act and stated at 304 (many cases cited in the margin):

“Without passing upon the question of constitutionality, the court dismissed the bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal.”

“As it is no longer open to deny that the averments of unconstitutionality which were relied upon, if well founded, justified
EQUITABLE RELIEF UNDER THE BILL.

“Decree is reversed.”

The Court will find our contention fully sustained in the citations in the margin of *Kennington v. Palmer*, above, which included *Hammer v. Dagenhart*.

The Supreme Court has said:

“It is a settled principle of equity juris-

prudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit * * * Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." *Davis v. Wakelle*, 156 U. S. 680, 688, 15 S. Ct. 585, 39 L. ed. 578.

But the mere fact that damages are recoverable at law is no objection to the granting of an injunction in case such damages would not be an adequate compensation for the injury. *Kessler v. Eldred*, 206 U. S. 285, 27 S. Ct. 611, 51 L. ed. 1065; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *General Electric Co. v. Westinghouse Electric Co.*, 151 Fed. 664; *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 10 Fed. 497, 4 Woods 360.

An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be accurately computed (*Delaware, etc., R. v. Frank*, 110 Fed. 689), or where the amount cannot be adequately proved (*Angier v. Webber*, 14 Allen (Mass.) 211, 92 Amd. 748; *Thompson's Express, etc., Co. v. Whitemore* (N. J. Ch. 102 A. 692; *Christie v. Shankey*, 12 N. Y. St. 657).

The Federal courts are not prevented from giving equitable relief by injunction against the enforcement of void freight rate laws, to citizens of other states, merely because the state in passing the law has provided a remedy in the courts of law of that state. A state cannot tie up a citizen of another state, having property rights

within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. *Smyth v. Ames*, 160 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819.

If the officials exceed their authority and arrest the plaintiff, as alleged, he will be unlawfully arrested, prosecuted and deprived of his liberty for a time at least, for which he cannot recover damages against the officials. Certainly false arrest is a damage to a citizen, yet there is no remedy at law in this case for such damage.

The Supreme Court in *Pierce, Governor v. Society*, 45 Sup. Ct. 571, on June 1, 1925, upheld an injunction against the enforcement of an unconstitutional statute, the only enforcement of which could have been by a criminal proceeding, notwithstanding that the statute would not become effective until next year, 1926.

It seems perfectly clear that taking into account the condition and circumstances of the appellant and uncertainty as to the time, place and method of arresting him and moving him before a habeas corpus could be issued, that habeas corpus does not furnish sufficient remedy at law, and as the officers, as we understand it could exceed their authority the appellant would be damaged and would be deprived of his liberty and his business would be interfered with and possibly destroyed, just as in the *Oregon School* case above.

It seems perfectly clear that the foregoing cases establish the principle that officials can be prohibited from exceeding their authority when it affects the property or liberty of citizens, regardless of any remedy at law, it being part of the principle that it is impossible to measure damages,

where there is an unlawful excess of authority. They also established the principle that habeas corpus does not furnish a full adequate and sufficient remedy at law so as to prevent relief by prohibition because if this appellant is arrested and held, and a habeas corpus issued out, he is to that extent falsely arrested and imprisoned and there is no remedy at law for damages against the officials. Clearly appellant is entitled to the writ of prohibition prayed.

There are cases to the effect that habeas corpus is a criminal proceeding where the prisoner is detained under criminal or quasi-criminal process. *People v. Bradley*, 60 Ill. 390; *Gleason v. McPherson County*, 30 Kan. 53, 1 Pac. 384; *State v. Judge Commercial Court*, 15 La. 192, 194; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *McFarland v. Johnson*, 105, 109.

Surely appellant should not be relegated to a semi-criminal proceeding preceded by the reflecting and humiliating process of arrest and bail, with attendant costs and expenses.

CONCLUSION.

As under all the facts alleged and admitted the appellees have no jurisdiction to deport appellant, or forfeit his bond and arrest him, and as he is entitled to remain in the United States and become a naturalized citizen, it is submitted, and urged, that the order appealed from should be reversed, the demurrer overruled and judgment entered directing the issuance of the writ of prohibition prayed, or that the lower Court be directed to issue such writ.

Respectfully submitted,

RAYMOND M. HUDSON,
Attorney for Appellant.

April 15, 1931.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 7 - 1931

No. 5322

Henry W. Hodges

~~CLERK~~

**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1931

ARON POLISZEK, ALIAS HARRY FISHBONE,
APPELLANT

v.

WILLIAM N. DOAK, SECRETARY OF THE DEPARTMENT
OF LABOR, AND/OR ROBE CARL WHITE, ACTING
SECRETARY OF THE DEPARTMENT OF LABOR

BRIEF FOR APPELLEES

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In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1931

No. 5322

ARON POLISZEK, ALIAS HARRY FISHBONE, APPELLANT

v.

WILLIAM N. DOAK, SECRETARY OF THE DEPARTMENT
of Labor, and/or Robe Carl White, Acting Secre-
tary of the Department of Labor

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from an order of the Supreme Court of the District of Columbia sustaining a demurrer to the appellant's traverse filed to the answer of the Secretary of Labor and Acting Secretary of Labor to appellant's petition for a writ of prohibition. The demurrer was sustained on the ground that a writ of prohibition is not the proper remedy for determining the rights of the appellant.

THE QUESTION

The question is whether the Supreme Court for the District of Columbia erred in ruling that a writ

of prohibition is not the proper remedy for determining the rights of the appellant as alleged.

STATEMENT OF FACT

As appellant's statement of facts contains assertions controverted by appellees, a statement of facts at this point is permitted under Rule VIII of this court.

The appellant is an alien who arrived in the United States on December 22, 1922. (R. 2.) He was given a hearing by a Board of Special Inquiry and under the provisions of Section 3 of the Immigration Act of February 5, 1917 (8 U. S. C. 136), was ordered excluded from the United States by the Board because (1) suffering from a physical defect (deaf-mutism) which affected his ability to earn a living, (2) was a person likely to become a public charge, and (3) was unable to read; and upon appeal to the Secretary of Labor the Second Assistant Secretary of Labor, to whom the former had assigned the duty of deciding cases on appeal, affirmed the excluding decision, but directed that the appellant be admitted temporarily under bond for a period of six months under authority of the ninth proviso to Section 3, so he could look after his interests in the estate of his father who died in this country. (R. 7, 8, 9.) A bond in the sum of \$500 was executed on January 15, 1923. The bond recites, among other things, that the Secretary of Labor has, in his discretion, decided to admit the alien into the United States temporarily, and the

conditions of the bond require that the obligors shall, so long as the alien remains in the United States, save harmless the United States, every State and other named political subdivisions thereof, and every institution thereof supported in whole or in part by public funds, against the alien becoming a public charge; that the obligors shall submit to the Immigration Officer in Charge at the port of New York a written report within thirty days prior to the expiration of each six months' period thereafter, respectively, showing the occupation and residence of the appellant and whether he has been an inmate of a public institution during the period covered by the report; that the alien, on or before six months from the date of the bond, shall depart from the United States, without expense to the United States; and that the Commissioner of Immigration at the port of New York shall receive from the obligors, at least five days prior to such departure, information as to date of sailing and name of vessel by which the appellant shall depart. (R. 6, 7.) On July 15, 1923, by authority of the Secretary of Labor, the temporary stay was extended for a period of one year, and on July 15, 1924, a further extension for a like period was granted. (R. 8.) On July 2, 1924, one W. W. Sibrary, then Assistant Commissioner General of Immigration, Washington, D. C. (now deceased), wrote a letter to one Walter J. Tucker, of the Mystic Oral School for the Deaf, Mystic, Connecticut, concerning the appellant, stating, among other

things, that the appellant would be given "an examination upon the expiration of his extended stay to determine whether he may be permitted to remain in this country permanently." (R. 3, 8.)

The alien requested the Bureau of Immigration and Department of Labor to accord him a hearing to determine his right to remain permanently in the United States, but such request was refused for the reason that said W. W. Sibray had no authority under the immigration laws and regulations to write said letter, nor was he authorized by the Secretary of Labor or any other proper official of the Department of Labor to write said letter, and his action in so doing is not binding upon the Secretary of Labor. (R. 3, 8.) Thereafter a petition for a writ of prohibition was filed against the Secretary of Labor and/or the Acting Secretary of Labor to prohibit both or either of them, their assistants, and attorneys from in any manner interfering with the appellant, with his personal movements, business, and affairs, from declaring his bond forfeited, annoying him with notices that he must leave the United States or that he would be deported, from issuing any warrant of arrest or for the deportation of the appellant, from taking any proceedings to have the appellant arrested or confined in jail or restraining him in his liberty or from forcibly restraining and taking charge of and removing or deporting the appellant, or requesting any one else or any other Government official or attorney to do any of said acts; and that the appel-

lant be granted a full and complete hearing and that all his rights be established and orders and decrees be entered, protecting him in his rights, liberty, and property, and for all such other and further relief may be granted as his case may require and may seem just and proper and that he be granted his costs.

STATUTES

Section 3, Immigration Act of 1917 (8 U. S. C. 136) :

That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; * * * persons likely to become a public charge; * * *.

* * * * *

That after three months from the passage of this act in addition to the aliens who are

by law now excluded from admission into the United States, the following persons shall also be excluded from admission thereto, to wit:

All aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish: * * * *Provided further*, That the Commissioner General of Immigration with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission: * * *.

Section 16, Immigration Act of 1917 (8 U. S. C. 152):

That the physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service * * * who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *. All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Secretary of Labor, and under such administrative regulations as he may prescribe and under medical regulations pre-

pared by the Surgeon General of the United States Public Health Service. * * *

Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. That the inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States and the examination of aliens arrested within the United States under this act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Secretary of Labor and under such regulations as he may prescribe. * * *. Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; * * *. All aliens coming to the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they in-

tend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes enumerated in section three hereof. Any commissioner of immigration or inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may, in the event of neglect or refusal to respond to a subpoena issued by any commissioner of immigration or inspector in charge or refusal to testify before said immigrant inspector, issue an order requiring such person to appear before said immigrant inspector, produce books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof; * * *. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry,

in all cases where an appeal to the Secretary of Labor is permitted by this act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation.

Section 17, Immigration Act of 1917 (8 U. S. C. 153) :

* * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor: *Provided*, That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section 3 of this act.

Section 19, Immigration Act of 1917 (8 U. S. C. 155) :

That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

Section 21, Immigration Act of 1917 (8 U. S. C. 158):

That any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis in any form or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Labor upon the giving of a suitable and proper bond or undertaking, approved by said Secretary, in such amount and containing such conditions as he may prescribe, to the United States and to all States, Territories, counties, towns, municipalities, and districts thereof, holding the United States and all States, Territories, counties, towns, municipalities, and districts thereof harmless against such alien becoming a public charge. * * *

Act of May 19, 1921 (42 Stat. 5), as amended
May 11, 1922 (42 Stat. 540):

* * * * *

SEC. 2. (a). That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign born persons of such nationality resident in the United States as determined by the United States census of 1910. * * *

* * * * *

(d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this act shall have been admitted all other aliens of such nationality, except as otherwise provided in this act, who may apply for admission during the same fiscal year shall be excluded: * * *

(NOTE.—*The foregoing provisions of the act of May 19, 1921, as amended, show the primary purpose and object thereof and are sufficient to make plain that the statute was in no wise involved in the appellant's case.*)

Joint Resolution of June 7, 1924 (43 Stat. 669):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following aliens arriving in excess of quotas fixed under authority of the Act entitled "An Act to limit the immigration of aliens into the United States," approved May 19, 1921, as amended and extended, may, if otherwise admissible and if not subject to deportation

for other causes, be permitted to enter and remain in the United States without regard to the provisions of such Act of May 19, 1921, as amended and extended:

(1) Aliens heretofore admitted in excess of quota and charged to the quota of a later month;

(2) Aliens heretofore admitted under a construction of such Act of May 19, 1921, required by court decision;

(3) Aliens arriving in the United States after May 26 and before July 1, 1924, who departed for the United States from the last port outside the United States or outside foreign contiguous territory on or before May 26, 1924, believing in good faith that they would be admitted pursuant to a construction of such Act of May 19, 1921, required by court decision; and

(4) Aliens heretofore temporarily admitted under bond to relieve cases of extreme hardship.

ARGUMENT

The court below did not err in holding that the appellant was not entitled to a writ of prohibition.

The office of a writ of prohibition is to prevent an unlawful assumption of jurisdiction by the court or tribunal against which it is sought and not to correct mere errors and irregularities. (*In re Cooper*, 143 U. S. 472, 495, citing *Ex parte Gordon*, 104 U. S. 515; and *Ex parte Ferry Company*, 104 U. S. 519.) In denying a petition for a writ

of prohibition in *Ex parte Ferry Company* the Supreme Court said (p. 520) :

It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise. A prohibition can not be made to perform the office of a proceeding for the correction of mere errors and irregularities. If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is the judgment of the court of last resort, and concludes the suit. It rests with Congress to decide whether a case shall be reviewed or not.

Where the court or tribunal sought to be prohibited has jurisdiction over the subject matter or the person, the writ does not lie (*Smith v. Whitney*, 116 U. S. 167, and *Ex parte Bakelite Corporation*, 279 U. S. 438). "To warrant a court in granting this extraordinary remedy, it should clearly appear that the inferior tribunal is actually proceeding, or about to proceed, in some matter over which it possesses no rightful jurisdiction." (High, *Extraordinary Legal Remedies*, section 780, page 566.) In *Smith v. Whitney*, *supra*, the Supreme Court said (p. 176) :

The object of a writ of prohibition is to prevent a court of peculiar, limited, or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance.

It can only be used to restrain the exercise of judicial functions.

* * * * *

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It can not be made to serve the purpose of a writ of error or *certiorari*, to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. These rules have been always adhered to by this court, in the exercise of the power expressly conferred upon it by Congress to issue writs of prohibition to the District Courts sitting as courts of admiralty.

The Supreme Court further stated in *Smith v. Whitney, supra* (page 175), that if the petition for writ of prohibition was rightly dismissed by the Supreme Court of the District of Columbia for any reason, whether because the court had no jurisdiction to issue a writ of prohibition to a court-martial, or because the court-martial had jurisdiction of the charges against the petitioner, the judgment dismissing the petition must be affirmed. Accordingly, the court, after exhaustively reviewing the authorities on the point, held that the Supreme Court for the District of Columbia had no jurisdiction over the court-martial proceedings and affirmed the judgment appealed from.

It is extremely doubtful whether the writ of prohibition lies against a cabinet or other executive

officer of the Government. In the case of *In Re Macfarland*, 30 App. D. C. 365, this court said:

Prohibition is one of the remedial prerogative writs of the common law to prevent an inferior court from assuming jurisdiction of a matter beyond its legal cognizance.

In *Smith v. Whitney, supra*, in reference to writ of prohibition, the Supreme Court said: "It can only be issued to restrain the exercise of judicial functions." The various cases of prohibition decided by this court have been examined, and in every instance it appears that the writ was sought against a judge of some other court. In *High, Extraordinary Legal Remedies*, section 782, page 568, it is said, with regard to the writ:

The legitimate scope and purpose of the remedy being, as we have already seen, to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon other tribunals, it can not properly be extended to officers or tribunals whose functions are not strictly judicial. And while there are cases where the writ has been granted against ministerial officers entrusted with the collection of taxes, yet the better doctrine, both upon principle and authority, undoubtedly is it will not lie as against ministerial officers, such as collectors of taxes, or as against municipal boards of quasi-judicial functions, entrusted with taxing powers, to restrain them from levying or collecting taxes.

The same author further says, section 783, page 569:

Prohibition will not lie against the governor of a state, to restrain him from granting a commission to a person claiming to be duly elected to a public office. The grounds on which the relief is refused in such case are, that the judiciary has no power to invade the province of the executive, the three departments of the government under our system being distinct and independent, and that prohibition is in no event a fit remedy to restrain the head of the executive department in the execution of his duties.

The Immigration Act of 1917 prescribes the procedure for the exclusion and deportation of aliens. Section 3 prescribes the classes of aliens who shall be excluded from the United States. Section 16 provides that all arriving aliens shall be examined under oath by immigrant inspectors under administrative regulations prescribed by the Secretary of Labor. Section 17 provides for a hearing by a board of special inquiry of an alien detained at ports of entry for determination of his eligibility for admission to the United States. That section further provides that the members of a board of special inquiry shall be selected from such immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall designate as qualified to serve on such boards. Section 17 further provides that the decision of a board of special inquiry ad-

verse to the admission of an alien shall be final unless reversed on appeal to the Secretary of Labor, but makes the decision of such board final when based upon certificates of medical officers of the United States Public Health Service that aliens are affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, except as provided in Section 21 of the 1917 Act. Section 19 of the act prescribes the procedure for the deportation of aliens by declaring that aliens of the classes enumerated therein who are in the United States unlawfully shall, upon the warrant of the Secretary of Labor, be taken into custody and deported, and all other provisions of law providing for the deportation of aliens declare that this same procedure shall be employed. Section 19 further provides that the decision of the Secretary of Labor shall be final. The 1917 Act, therefore vests the Secretary with plenary power and authority over the exclusion and deportation of aliens and his jurisdiction to exclude inadmissible aliens and deport those found to be in the United States unlawfully is clear and beyond question.

Under Section 3 of the 1917 Act the appellant was properly ordered excluded from the United States because he was physically defective to the extent of affecting his ability to earn a living, was a person likely to become a public charge and unable to read though physically capable to do so. The excluding decision being based on facts in evidence, and not being arbitrarily made, it can not

be disturbed by the courts (*Low Wah Suey v. Backus*, 225 U. S. 460, 568; *Zakonaite v. Wolf*, 226 U. S. 272; *Lewis v. Frick*, 233 U. S. 291; *Gegiow v. Uhl*, 239 U. S. 3; *Louie Lung Gooley v. Nagle*, 49 F. (2d) 1016, and the decisions cited therein).

In admitting the appellant temporarily under bond pursuant to the provisions of the ninth proviso of Section 3 of the 1917 Act, the Secretary of Labor retained jurisdiction over him to see that he departed from the United States under the conditions under which he was admitted, and he agreed to enter, as set forth in his bond. While it is the duty of the obligors to see that the appellant departed on or prior to the date designated for his departure, the Secretary of Labor has jurisdiction to deport him under Section 19 of the 1917 Act, in view of his failure to so depart (*United States v. Goldberg*, 40 F. (2d) 406; C. C. A. 2nd), as that section specifically authorizes the deportation of any alien who at the time of entry was a member of one or more of the classes excluded by law.

The seeking of a writ of prohibition in this case is an attempt to secure in the lower court a review of the legality of the decision of the Secretary of Labor ordering the alien excluded, but that he might be admitted temporarily, for which procedure there is no authority of law, as under Section 17 of the 1917 Act (8 U. S. C. 153) the administrative decision is final. The fact that there is no provision made for a direct review of such decision does not justify the issuance of a writ of pro-

hibition (*Ex parte Ferry Company, supra*). The prohibition proceeding is also an attempt to interfere with the exercise of administrative functions vested solely in the Secretary of Labor to proceed against an alien who is clearly in the United States unlawfully. In effect, what is sought is a declaratory judgment in advance of any action by the administrative authorities affecting any of the appellant's rights that his arrest for deportation, if and when made, would be illegal. This appears from the fact that the appellant does not aver or allege in his petition for the writ that at any stage of the administrative proceedings he protested that he was not within the jurisdiction of the immigration authorities or that they had no jurisdiction over him. That such objection is essential to lay the basis for prohibition proceedings appears from the following statement of the law by High, Extraordinary Legal Remedies, section 773, page 558:

At the common law, to authorize a prohibition to an inferior court for want of jurisdiction, it was necessary that a plea to the jurisdiction should be tendered in that court before imparlance, and that the court should refuse to entertain the plea. The common law rule is believed to be generally applicable in this country, and the writ will not go to a subordinate tribunal in a case arising out of its jurisdiction until the want of jurisdiction has first been pleaded in the court below and the plea refused.

The Supreme Court pointed out in its opinion in *Smith v. Whitney, supra*, that the petitioner for the writ in that case objected, at the very beginning of the proceedings before the court-martial, that it had no jurisdiction to try him on the charges laid before it; and the facts upon which his objection to its jurisdiction were based, as well as the formal judgment dismissing his petition for a writ of prohibition, appeared in the record of the case. Because of these facts, the Supreme Court stated, the case was one coming within its appellate jurisdiction.

The order of the lower court was entirely proper for another reason. It is a well settled doctrine that the writ of prohibition will never issue except where the court is without jurisdiction, and not even then if there is another remedy. This was stated by this court in the case of *In Re Macfarland*, 30 App. D. C. 365, on the authority of the following cases: *In re Rice*, 155 U. S. 396; *Alexander v. Crollott*, 199 U. S. 580; *Morris v. Scott*, 25 App. D. C. 88; *United States ex rel. Holmead v. Barnard*, 29 App. D. C. 431. To the same effect is *Deffer v. Kimball*, 7 App. D. C. 499, 501. The appellant in the instant case has a complete and adequate remedy at law with respect to the forfeiture of the bond given in his behalf, as the period within said bond is conditioned appellant should depart from the United States expired on July 15, 1925, and the rights of the United States Government arising out of the breach of the conditions of the bond having accrued the legality of the bond can be con-

tested by appellant, if he so desires, upon the Government instituting a suit for collection of the penalty, as the appellees contended in the lower court. If and when the appellant is ordered deported he will likewise have a complete and adequate remedy by habeas corpus. It has repeatedly been held that a writ of habeas corpus is the proper remedy for reviewing deportation proceedings against an alien (*United States ex rel. Singleton v. Tod*, 290 Fed. 78; *United States v. Jung Ah Lung*, 124 U. S. 621; *Ng Fung Ho v. White*, 259 U. S. 276; and *United States v. Sing Tuck*, 194 U. S. 161). In the case of *In re Ban*, 21 F. (2d) 1009, a writ of certiorari was applied for to the United States District Court for the Western District of New York to review an order of deportation. The court refused to issue the writ because the petitioner had a plain and adequate remedy by habeas corpus or otherwise. That habeas corpus is the proper proceeding to review deportations proceedings was upheld by this court in the recent case of *Fafalios v. Doak*, 50 F. (2d) 640, decided May 4, 1931. In that case a bill of injunction was filed in the Supreme Court of the District of Columbia, seeking the cancellation of an order of deportation and the bond given by the alien. The Secretary of Labor filed a motion to dismiss the bill and it was sustained by the court. That judgment was affirmed by this court in an opinion holding that a bill for injunctive relief was not the alien's remedy, but that instead the propriety of his deportation should

be tried out by means of a writ of habeas corpus in the proper district in which the alien lived, he not being a resident of the District of Columbia. In its opinion, this court said:

By surrendering to the proper immigration officer, the writ of habeas corpus will be available to appellant. "The Court then, for the time being, having control of the person of the relator, may determine the facts of the case and dispose of him as law and justice require." *Sibray v. United States* (C. C. A.), 185 F. 401, 404. In other words, the writ will accord him an adequate and complete remedy. Should appellant's contention be sustained, every alien, by merely giving bail, might test the legality of the deportation proceedings through a bill in equity in the District of Columbia, instead of through a writ of habeas corpus in the proper district.

The only appealable issue presented by the record seems to be whether the lower court erred in holding that the writ of prohibition was not appellant's proper remedy. The appellant, however, discusses other questions in his brief which were not passed upon by the court below, which discussion seems to violate paragraph 4 of Rule V, and this court, it appears, is not required to decide such questions, in view of paragraph 3 of the same rule. The questions raised are discussed herein in case the court may find it necessary to pass upon them.

It is contended by appellant that the lower court erred in not holding that he was admissible to the

United States under Section 21 of the Immigration Act of 1917 (8 U. S. C. 158), and having been admitted under that section by the Secretary of Labor in his discretion and bond taken, appellant (1) can not be deported, and (2) the Secretary of Labor has no jurisdiction to forfeit appellant's bond or to issue a warrant of deportation, as, it is claimed, appellees admit appellant has not become, nor is he likely now to become, a public charge. That contention is insupportable, as appellant was not temporarily admitted under Section 21. That section authorizes the Secretary of Labor to admit under a bond in such amount and containing such conditions as he may prescribe "any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis in any form or a loathsome or dangerous contagious disease," provided, however, that such alien is "otherwise admissible." Appellant is not within the purview of Section 21 for the reason that he was not "otherwise admissible," inasmuch as he was also excluded because of his inability to read. In *United States ex rel. Ghersin v. Commissioner of Immigration*, 288 Fed. 756, decided by the Circuit Court of Appeals for the Second Circuit, it was held that an alien unable to read could not invoke Section 21, as that ground for exclusion barred the alien from the benefits of that section. In *Tulsidas v. Insular Comptroller of Customs*, 262 U. S. 258, the Supreme Court held that the admissibility of an alien under the immigration laws must be deter-

mined as of the time of his arrival in the United States. Under that decision appellant now has the same status under the immigration laws as he had when he applied for admission. The fact that he learned to read while here temporarily, or his condition has otherwise changed, does not bar his exclusion and deportation. (*United States ex rel. Ickowicz v. Day*, 18 F. (2d) 962, affirmed by Circuit Court of Appeals for the Second Circuit, its opinion being reported in same volume and same page.)

It is further contended by appellant that the court erred in failing to hold that deaf mutes are not barred by the statute, but only feeble-minded, and that deaf mutes are not feeble-minded. The excluded classes enumerated in Section 3 of the 1917 Act include "feeble-minded persons," but that section further provides that persons not comprehended within any of the specified excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of the alien to earn a living, may also be excluded. The appellant, therefore, was excluded, not because he was feeble-minded, but because his physical defect affected his ability to earn a living. Furthermore, the alien was excluded because of his inability to read, and he was held not to be exempted from the reading requirement because he was a deaf mute, which was entirely

proper in view of the decision of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Engel v. Tod*, 294 Fed. 820. The case of *United States ex rel. Fink v. Tod*, 267 U. S. 571, cited by appellant, is not in point as the alien involved therein was excluded because feeble-minded.

Appellant further contends that the lower court erred in failing to hold that under Subdivision 4 of the Joint Resolution of June 7, 1924 (43 Stat. 669), the appellees had no jurisdiction (1) to issue a warrant of deportation, (2) that appellant could remain in the United States and not be deported, and (3) the said resolution removed any right, if there was such, which appellant denies, to deport appellant at any time. The Joint Resolution referred to is wholly inapplicable to the case. The express provisions of the Joint Resolution embrace only aliens "arriving in excess of the quotas fixed under authority of the Act entitled 'An Act to limit the immigration of aliens into the United States,' approved May 19, 1921, as amended and extended." The plaintiff did not arrive in excess of the quotas prescribed under the 1921 Act, nor was he excluded on that ground, nor is there any averment or allegation in the pleadings that he so arrived or was so excluded. Furthermore, the Joint Resolution applies to aliens arriving in excess of the quotas who are "otherwise admissible and if not subject to deportation for other causes." The appellant was not "otherwise admissible" under the immigration laws, and by his failure to depart from this country

within the time he was permitted to remain temporarily he is now subject to deportation.

For the reasons herein set forth, it is respectfully submitted that the order of the lower court sustaining the demurrer should be affirmed with costs.

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FEB 3-1932

Court of Appeals
OF THE DISTRICT OF COLUMBIA.

Henry W. Hodges

CLERK

JANUARY TERM, 1932.

No. 5322.

ARON POLIZEK alias HARRY FISHBONE,

Appellant,

v.

WILLIAM N. DOAK, Secretary of the Department of
Labor of the United States of America, and/or ROBE
CARL WHITE, Acting Secretary of the Department
of Labor of the United States of America,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

REPLY BRIEF OF APPELLANT.

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Court of Appeals
OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1932.

No. 5322.

ARON POLIZEK alias HARRY FISHBONE,
Appellant,
v.

WILLIAM N. DOAK, Secy. &c., *et al.*,
Appellees.

Appeal from the Supreme Court of the District of
Columbia.

REPLY BRIEF OF APPELLANT.

The contention that Prohibition will not lie against an Executive Officer is without merit and *Smith v. Whitney*, 116 U. S. 167, at 175, did not decide otherwise. That case refrained from deciding whether or not prohibition will lie to a Court-martial in the Navy if it is without jurisdiction of the charge, but held that the Secretary of the Navy is not a necessary party to the writ as he is not trying the accused; he is not a member of the Court; it further held that if the Court-martial has jurisdiction, as it had in that case, of the offense charged that then Prohibition will not lie to serve the purpose of certiorari.

In *Smith v. Whitney*, above at page 175, the Court said:

“It is argued in behalf of the petitioner that the Supreme Court of the District of Columbia is authorized to issue writs of prohibition, on the same grounds on which it was held in *United States v. Schurz*, 102 U. S. 278 (Bk. 26, L. ed. 167), to be authorized to issue writs of mandamus, namely: because by the Act of February 27, 1877, chap. 69, 2, 19 Stat. at L. 253, that court has cognizance of ‘all cases in law and equity between parties, both or either of which shall be resident or found within said District;’ as well as because it has all the powers formerly exercised by the Courts of Maryland, which as declared by the Court of Appeals of that State in *Price v. State*, 8 Gill 295, 310, included ‘all the powers exercised in England by the Court of King’s Bench, so far as these powers are derived from rules and principles of the common law, and so far as the same are suited to the change in our political institutions, and are not modified by our constitutional or statutory enactments.’ On the other side, it is contended that neither the Supreme Court of the District of Columbia nor any other courts of the United States is empowered to issue writs of prohibition to a court-martial. Whether the Supreme Court of the District of Columbia has power in any case to issue a writ of prohibition to a court-martial is a question of great importance not heretofore adjudged by this court; and

we are not inclined, in the present case, either to assert or deny the existence of the power, because upon settled principles assuming the power to exist, no case is shown for the exercise of it. In deciding the case upon the facts before us, and expressing no opinion upon the broader question, because the determination of the case does not require it, we take the same course that has been followed by eminent English judges in disposing of applications for writs of prohibition under similar circumstances. *Ex parte Smyth*, Tyrwh. & Gr. 222, 225; S. C. 2 Cr. M. & R. 748, 753; 1 Gale, 247, 277; *Re Foster*, 4 B. & S. 187, 198. The object of the writ of prohibition is to prevent a court of *peculiar*, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance."

If there was any doubt of the jurisdiction of this court to issue a writ of prohibition against an Executive Officer of the Government at the time of the decision in *Smith v. Whitney*, 116 U. S. 175, and the Court did not express any doubt, the same has been removed by the enactment of Code 61 and Code 68, which broaden the jurisdiction beyond the statute in effect when *Smith v. Whitney* was determined, and Code 68 specifically provides for Writ of Prohibition as at Common law and in equity practice, without any limitation whatever. (See *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919.)

Code, Sec. 61. Jurisdiction.—"The said court shall possess the same powers and

exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia under the Act of Congress approved March third, eighteen hundred and sixty-three, creating that court, and at the date of the passage of this code." 32 Stat. L., Pt. 1, page 522.

Act of March 3, 1863 (12 Stat. L., p. 762). R. S. D. C., Secs. 760, 761; Comp. Stat., D. C., page 295, Secs. 19, 20.

Code, Sec. 68. Writs.—“The said Supreme court may, in its appropriate special terms, issue writs of quo warranto, mandamus, *prohibition*, scire facias, certiorari, injunction, prohibitory and mandatory, ne exeat, and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction. Any justice of said court may issue writs of habeas corpus, to inquire into the cause of detention or to discharge on giving bail.”

Appellees do function as a Court in a judicial or semi-judicial capacity, in deportation cases, with required hearings, taking of testimony and examination of witnesses and argument of counsel for the alien.

In *American School &c. v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, it was held that the determination of the Postmaster General that letters ad-

dressed to a certain corporation should be refused delivery is not so conclusive on the Federal Courts as to preclude them from granting injunctive relief to such corporation, *where his action was not authorized by the statute under which he assumed to act.*

Zakonaite v. Wolf, 226 U. S. 273, 57 L. ed. 272, held that *judicial powers* are not unconstitutionally *vested* in the *executive branch* of the government by the provisions of the act of Feb. 20, 1907, for the deportation of an alien found to be practising prostitution within three years after her entry into the United States, although the inquiry under that statute devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, *after a fair though summary hearing*, are made conclusive.

Prohibition will lie against Executive Officers. All the cases so hold: *Bee Hive Min. Co. v. Commonwealth Industrial Commission*, 144 Va. 240, 243; 132 S. E. R. 177; *State v. Hinkle*, 130 Wash. 419, 227 Pac. 861; *Baker v. Gooding County Commrs.*, 25 Idaho 506, 138 Pac. 342; *Payne v. Speakman*, 96 Okla. 170, 221 Pac. 9; *State v. Juden* (Mo. A.), 264 S. W. R. 101; *Mitchell v. Croppey*, 177 App. Div. 663, N. Y. S. 336; *People v. Witherspoon*, 94 Misc. 419, 157 N. Y. S. 923 (aff. 76 App. Div. 947, mem. 162 N. Y. S. 1138).

In *Bee Hive &c. v. Commonwealth Ind. Com.*, above, the Virginia Court said:

“The principle is well established that a writ of prohibition may issue to restrain

a quasi judicial body from attempting to usurp unauthorized judicial powers. The following authorities, among others, sustain this proposition: *Harriman v. Waldo County Commissioners*, 53 Me. 83; *Connecticut River, etc., Co. v. Franklin County Commissioners*, 127 Mass. 50, 34 Am. Rep. 338; *Speed v. City of Detroit*, 57 N. W. 406, 98 Mich. 360, 22 L. R. A. 842, 39 Am. St. Rep. 555; *State v. Bright*, 1235 W. 1057, 224 Mo. 514, 135 Am. St. Rep. 552, 20 Ann. Cas. 955; *People v. Transue*, 132 N. Y. S. 497, 74 Misc. Rep. 504; *Railroad Co. v. Love*, 118 P. 259, 29 Okl. 523; *Railroad Co. v. Commission*, 118 P. 263, 29 Okl. 534; *Ostmann v. Frey*, 128 S. W. 253, 148 Mo. App. 271; *People v. Burdett*, 195 Ill. App. 255; *People v. Nixon*, 179 N. Y. S. 82, 109 Misc. Rep. 7; *State v. True*, 184 P. 229, 26 Wyo. 314.

‘A public board, acting in a quasi judicial character, becomes an inferior tribunal amenable to the writ, wherever it exceeds its authority or exercises an authority which it does not possess. 32 Cyc. “Prohibition”, 601.’ ”

In *State v. Hinkle*, 130 Wash. 419, 227 Pac. 861, the writ issued against the Secretary of State, citing many cases.

In *National Remedy Co. v. Hyde, Secy.*, 60 App. D. C. , 50 F. (2d) 1066, in granting an injunction against the Secretary of Agriculture this Court said:

“In the present case, the action and pro-

posed action of the Department would under the averments of the bill, in effect deprive appellant of its property through the destruction of its business before the issues involved could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power and is a deprivation of due process of law."

In *Gegiow v. United States*, 239 U. S. 4, 60 L. ed. 114, the court held alien immigrants cannot be deported under the immigration act of February 20, 1907 as amended by the act of March 26, 1910 "persons likely to become a public charge", merely because the labor market in the city of their immediate destination is overstocked, and the Court said:

"The courts are not forbidden by the statute to consider whether the reasons when they are given, agree with the requirements of the act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under #25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336,

relied upon by the government. As was said in *Gonzales v. Williams*, 192 U. S. 1, 15, 48 L. ed. 317, 322, 24 Sup. Ct. Rep. 177: ‘As Gonzales did not come within the act of 1891 (26 Stat. at L. 1084, chap. 55), *the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.*’”

“Such a case stands no better than a decision *without a fair hearing which has been held to be bad*. *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 269, 28 Sup. Ct. Rep. 201. See further *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31; *Lewis v. Frick*, 233 U. S. 291, 297, 58 L. ed. 967, 971, 34 Sup. Ct. Rep. 488.”

The United States Supreme Court has often recognized Prohibition as the counterpart of Mandamus. *In re Davis*, 262 U. S. 273, 67 L. ed. 979; *In re Muir*, 65 L. ed. 383 at 389, 254 U. S. 522 at 534; *Ex parte Oklahoma*, 55 L. ed. 431 at 435, 220 U. S. 198 at 208; *Huguley Mfg. Co.*, 184 U. S. 297, 46 L. ed. 549; *Ex parte Transportes Maritimos, etc.*, 264 U. S. 105, 68 L. ed. 580.

That court issued a writ of mandamus where both Mandamus and Prohibition were prayed, the Court stating:

“It does not matter very much in what form an extraordinary remedy is afforded in this case.”

The case was *Ex parte Simons*, 247 U. S. 231, 62 L. ed. 1094.

The Supreme Court thus held Prohibition a counterpart of Mandamus, and thus where Mandamus will issue to direct, Prohibition will issue to restrain.

U. S. v. West, 34 Apps. D. C. 12, 16, 17, held an appeal does not exclude the extraordinary writ of certiorari; that the District of Columbia Supreme Court can issue it to all tribunals; its jurisdiction is analagous to that of the King's Bench. To the same effect, *Smith v. Whitney*, 116 U. S. 175; *Price v. State*, 8 Gill 295; *U. S. v. Schurz*, 102 U. S. 378.

The power to issue a writ of prohibition to a court which has no jurisdiction of the cause exists at common law, and is not merely statutory. *London v. Cox*, L. R. 2 H. L. 239.

The power is an essential, inherent right of sovereignty, which, therefore, cannot be abandoned and destroyed. *Ibid.*; *Worthington v. Jefferies*, 32 L. T. N. S. 607.

Therefore, on due reason shown, a superior court is judicially bound as a debt of justice,—*ex debito justitiae*,—and not merely by virtue of, and in obedience to, a mandatory statute, to grant a writ of prohibition. *Ibid.*; *Jacobs v. Brett*, 32 L. T. N. S. 523; *Reg. v. Twiss*, 20 L. T. N. S. 525.

Jardine v. Superior Court, 2 Pac. (2nd series) 756, holds: Existence of remedy by appeal does not prevent use of Prohibition, where remedy by appeal is not adequate or speedy.

Of course there are cases where there is not an excess of jurisdiction by the Secretary of Labor, and then Habeas Corpus is the proper writ, but it is not the proper writ and is not full, adequate

and complete where there is no jurisdiction in the Secretary to proceed in a specific case as the ones at bar.

In *Fafalios v. Doak*, 60 Apps. , 50 F. (2d) 640, 59 W. L. R. , as we understand the case, it was not alleged that the Secretary was exceeding his jurisdiction; that is the facts alleged did not show an excess of jurisdiction, and the Court held where there is a remedy at law, there can not be an injunction in equity.

Where there is a remedy at law a litigant cannot go into equity, and the other proposition that where there is a remedy in a pure action at law, the court can not force a litigant to go into an impure, or quasi-criminal, law action to determine only civil matters and contests, is equally true.

Habeas Corpus is a quasi-criminal remedy as has been held in all the cases where the point was raised; they are cited in appellant's brief, page 30.

The Wickersham Commission reported that respondent and his assistants had flagrantly exceeded their powers and duties in many cases, and there are a number of cases now pending to prohibit respondent from further proceeding against aliens whom he arrested without any warrant, held two to four days in *incommunicado*, and coerced statements from, as shown by the records.

Congress passed the statute giving the aliens and others a right to Prohibition in this court, as well as Habeas Corpus, in some other court, thus establishing a legislative policy.

Now when these aliens have been illegally arrested and detained *incommunicado*, and deprived of their rights by the wanton acts of the respondent, and they fear that when he finishes his inves-

tigation he will grab them up unaware, as he did before, and railroad them out of the country, in the meantime holding them in *incommunicado*, preventing them from seeing or reaching friends and counsel, or obtaining a writ of habeas corpus, can this Court say we will abolish the legislative policy of giving the aliens and others an option to use Prohibition here in Washington, or Habeas Corpus out in some state?

Congress also established a legislative policy giving litigants the right of appeal from the Board of Tax Appeals, at their option, to either this Court, or to a Circuit Court of Appeals out in the States, now can this Court change that legislative policy and deny litigants the right to appeal from the Board to this Court? Is there any difference between the two cases?

If Congress thinks there should not be the right to sue for a writ of Prohibition in the Supreme Court of the District of Columbia against respondent or any Cabinet officer, then it can and should amend the statute, but this Court cannot amend, or change, it.

Congress granted the option to use Prohibition or Habeas Corpus, and the Courts cannot take it away; it is beyond the power of the Courts to do so.

The judgment appealed from should be reversed and remanded with costs and instructions to issue the writ of Prohibition as prayed.

Respectfully submitted,

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Washington, D. C., January 23, 1932.